

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-095855

09/17/2012

HON. ROBERT H. OBERBILLIG

CLERK OF THE COURT

R. Aguilera

Deputy

RUSSELL JONES

THOMAS M RYAN

v.

DARIN MITCHELL, et al.

WILLIAM MORRIS FISCHBACH III

COLLEEN CONNOR

MICHELE LEE FORNEY

WILLIAM J KEREKES

APPEALS-CCC

ATTORNEY GENERAL

COUNTY ATTORNEY-CIVIL SECTION

DOCKET-CIVIL-CCC

ELECTION CHALLENGE HEARING

DAY 2

RULING

Courtroom-OCH 309.

Prior to commencement of the proceedings, Defendant's exhibit 71 and Plaintiff's exhibits 72 through 89 are marked for identification.

9:40 a.m. This is the time set for continued Election Challenge Hearing Re: Plaintiff's Application for Order to Show Cause and for Preliminary and Permanent Injunctive Relief. The following parties are present or represented as indicated:

- Plaintiff Russell Jones is present with counsel, Thomas M. Ryan.
- Defendant Darin Mitchell is present with counsel, William M. Fischback, III and Timothy LaSota.

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- Defendant Secretary of State Ken Bennett is represented by counsel, Michelle Forney. Also present with Ms. Forney is Assistant Secretary of State, Jim Drake.
- Defendants Maricopa County Recorder Helen Purcell and the Maricopa County Board of Supervisors are represented by counsel, Otis Smith. Also present with Mr. Smith is Karen Osborne, the Maricopa County Elections Director.
- Defendants Yuma County Recorder Robyn Pouquette, who is present, and the Yuma County Board of Supervisors are represented by Deputy County Attorney, William Kerekas. Ms. Pouquette and Mr. Kerekas appear telephonically.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Johnny Robert Rae is sworn and testifies.

Plaintiff's exhibits 72, 73, 74, 75, 76, and 77 are received in evidence.

Upon motion of Defendant's counsel, Plaintiff's exhibit 90 is marked for identification and received in evidence.

Sandra Dowling is sworn and testifies.

Pursuant to stipulation of the parties', Defendant's exhibit 71 and Plaintiff's exhibits 78 through 89 are received in evidence.

Barry Voegele is sworn and testifies.

The witness is excused.

11:10 a.m. The court stands at recess.

11:20 a.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Diane Rosztoczy is sworn and testifies.

The witness is excused.

Plaintiff rests.

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Jeffrey Koontz is sworn and testifies.

Defendant's exhibit 42 is received in evidence.

12:01 p.m. The court stands at recess.

1:19 p.m. Court reconvenes with the parties and respective counsel present.

A record of the proceedings is made by audio and/or videotape in lieu of a court reporter.

Closing arguments are presented.

IT IS ORDERED taking this matter under advisement.

2:57 p.m. Hearing concludes.

LATER:

RULING

In this Legislative District 13 election challenge, Contestant/Plaintiff Russell Jones alleges that Contestee/Defendant Darrin Mitchell does not reside in District 13 but instead, actually resides in District 19.

The Trial to the Court took place on September 13 and 17, 2012. The Court has considered all the evidence, applicable law, determined credibility, and issues its ruling below:

Law

The Contestant has the burden of proof by clear and convincing evidence. Blaine v. McSpadden, 111 Ariz.147,149 (1974)

Pursuant to Article 7, §15 of the Arizona Constitution, a candidate for public office must be a qualified elector of the political subdivision in which that candidate may be elected. Similarly, A.R.S. §16-311(A) requires that a candidate file a nominating paper at least 90 days before the primary election "giving the person's actual residence address", and be a qualified elector who resides in the district the candidate proposes to represent. A.R.S. 16-101(B) defines resident to require "actual physical presence in the political subdivision, combined with an intent to remain." Finally, A.R.S. §16-672(A)(2) permits an elector to challenge whether the contestant "was not at the time of the election eligible to the office."

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The Plaintiff and Defendant dispute whether the law requires the issue of residence status be determined as of May 30, 2012 (Plaintiff's position) or August 28, 2012 (Defendant's position). This Court believes a proper interpretation of these statutes makes the relevant time period for determining actual presence and intent to remain in the political subdivision to include the date the nomination paper is filed, May 30, 2012, through the date of the primary election, August 28, 2012.

Both sides have presented considerable evidence regarding the issues of "actual physical presence" and "intent to remain." This Court's ruling is based in large part on this Court's determination of the credibility to be given to the testimony of the witnesses.

This Court finds Contestant Russell Jones has met his burden of proof by clear and convincing evidence. This Court finds that the credible evidence establishes that Darin Mitchell was not "eligible to the office" of District 13 State Representative by not establishing "physical presence" and "intent to remain" as required by Arizona law.

IT IS ORDERED granting the injunction and the Defendants herein are enjoined from placing Darin Mitchell's name on the General Election ballot for the State House of Representatives for Legislative District 13 at the General Election on November 6, 2012.

The Court finds that there is no just reason for delay and directs the Clerk to enter this Order pursuant to Ariz. R. Civ. P. Rule 54(b).

Pursuant to the ruling entered, and there being no further need to retain the exhibit(s) not offered in evidence in the custody of the Clerk of Court,

IT IS ORDERED that the Clerk permanently release all exhibits not offered in evidence to the counsel/party causing them to be marked or their written designee. Counsel/party or written designee shall have the right to refile relevant exhibits as needed in support of any appeal. Refiled exhibits must be accompanied by a Notice of Refiling Exhibits and presented to the Exhibit Department of the Clerk's Office. The Court's exhibit tag must remain intact on all refiled exhibits.

IT IS FURTHER ORDERED permanently releasing exhibits 10 through 15 to counsel for Plaintiff.

IT IS FURTHER ORDERED that counsel/party or written designee take immediate possession of all exhibits referenced above.

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ISSUED: Exhibit Release Form.

LET THE RECORD REFLECT that Court and counsel held an off the record discussion related to Plaintiff's exhibit 90. Pursuant to stipulation of counsel,

IT IS FURTHER ORDERED that Plaintiff's exhibit 90 shall be released to Plaintiff's counsel once the Court's Ruling is filed.

IT IS FURTHER ORDERED signing this minute entry as a final appealable Order of the Court.

DATE: 9-17-12

/ s / HON. ROBERT H. OBERBILLIG

HONORABLE ROBERT H. OBERBILLIG

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.